(2)

No. 05-915

In the

Supreme Court of the United States

CRYSTAL D. MEREDITH, Custodial Parent
and Next Friend of Joshua Ryan McDonald,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS INSTITUTE, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether achieving racial diversity is a compelling governmental interest sufficient to permit race-based restrictions on school assignments in public elementary and secondary schools.

2. Whether school districts' educational judgment is entitled to deference under strict scrutiny review when analyzing the use of a student's race in public elementary and secondary schools to achieve racial diversity or racial integration.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF), the Center for Equal Opportunity (CEO), and the American Civil Rights Institute (ACRI) submit this brief amicus curiae in support of Petitioner Crystal D. Meredith.[1] Letters of consent to file this brief were obtained from all parties and have been lodged with the clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purposes of engaging in litigation in matters affecting the public interest. PLF participated as amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case, including *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

CEO and ACRI are nonprofit research, education, and public advocacy organizations. Amici devote significant time and resources to the study of the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society. Amici publicly advocate the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. Amici have participated as amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case.

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether racial diversity in elementary and secondary (K-12) public schools may be deemed a compelling governmental interest sufficient to justify discriminatory school assignments based solely on the students' race. Specifically, Amici will show that the rationale for promoting student body viewpoint diversity in institutions of higher education, as discussed in *Gratz* and *Grutter*, simply has no counterpart in the context of elementary and secondary public schools. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Sixth Circuit issued a *per curiam* decision adopting the reasoning of the district court, which held that the assignment of Jefferson County's students to elementary and secondary public schools on the basis of their race does not violate the Equal Protection Clause. *McFarland v. Jefferson County Pub. Schools*, 416 F.3d 513 (6th Cir. 2005). In issuing this far-reaching decision, the court below extended unjustifiably the principles established in *Grutter* for competitive law school admissions, into the context of K-12 public school assignments. By doing so, the Sixth Circuit has reopened the permissibility of allocating educational opportunities on the basis of race throughout this country's 94,000 K-12 public schools, which educate approximately 47.7 million students ranging from 5 to 18 years of age, at an annual cost to taxpayers of more than $400 billion.[2] Discounting the

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[2] Nat'l Ctr. for Educ. Statistics, *Information on Public Schools and School Districts in the United States*, CCD Quick Facts, *at* http://

(continued...)

core concept of equal protection, Jefferson County's public schools are sending the wrong message to our children—that racial identification is more important than respect for individual rights and liberties in today's society.

No decision from this Court sanctions discriminatory student assignments to achieve racial balancing in K-12 public schools. *See Grutter*, 539 U.S. at 330. After *Grutter*, however, the lower courts are in disarray on whether classifying and assigning public school students on the basis of their race satisfies strict scrutiny. The First, Ninth, and now the Sixth Circuits have misapplied *Grutter*'s recognition of the educational benefits of diversity in competitive university admissions to K-12 student assignment plans and ignore the well-established narrow tailoring principles set out in *Gratz*. In contrast, prior to *Grutter*, the First and Fourth Circuits observed that whether racial diversity was a compelling governmental interest remained an open question, but found that such programs were not narrowly tailored.

Grutter's viewpoint diversity rationale cannot be extended to racial diversity in noncompetitive, compulsory K-12 public schools. Racial diversity in K-12 is based on the idea that a child's skin color determines how that child thinks and behaves, a practice denounced as racial stereotyping. *Grutter*, 539 U.S. at 328-29. This Court should grant the Petition for Writ of Certiorari to ensure that public schools provide educational opportunities to all their students without regard to irrelevant, immutable characteristics such as race. In so doing, the Court should clarify that *Grutter* does not sanction naked racial balancing as a compelling state interest, and that public school administrators should be required to pursue the many innovative, *non-race-based* policies at their disposal to avoid de facto re-segregation of their schools.

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[2] (...continued)
nces.ed.gov/ccd/quickfacts.asp (last visited Oct. 17, 2005).

REASONS FOR GRANTING REVIEW

I

THIS COURT MUST RESOLVE THE CONFLICT AMONG THE CIRCUITS ON WHETHER RACE-BASED ASSIGNMENTS TO ACHIEVE RACIAL DIVERSITY IN K-12 PUBLIC SCHOOLS CAN SURVIVE STRICT SCRUTINY

This case raises important, recurring questions relating to the scope of the Equal Protection Clause's prohibition of state-imposed racial discrimination in K-12 public schools. According to David J. Armor and Christine H. Rossell, nearly 1,000 school districts have some type of race-based assignment plan.[3] The goal of these plans is to achieve racial balancing so that each school's racial composition matches the district wide racial composition for a given race. This is achieved by sorting, assigning, and busing students according to their racial grouping. Such plans are mere proportional representation by pigmentation to achieve the public school administrator's preferred racial mix of students. The question of whether such discrimination is permissible in the context of K-12 public school assignments has hopelessly divided the Federal Circuit Courts of Appeals, and urgently demands resolution by this Court.

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[3] David J. Armor & Christine H. Rossell, *Desegregation and Resegregation in the Public Schools*, in Beyond the Color Line: New Perspectives on Race and Ethnicity in America 219, 226 (Abigail Thernstrom & Stephen Thernstrom, eds. 2002) *available at* http://www.google.com/search?q=cache:CWbm4yL_ROYJ:www.hoover.org/publications/books/fulltext/colorline/219.pdf+David+Armor+and+Christine+Rossell+%22Desegregation+and+Resegregation&hl=en

The Sixth Circuit's holding in the present case validating racial balancing is consistent with recent decisions of the First and Ninth Circuits, but conflicts with the pre-*Grutter* decisions of the First and Fourth Circuits condemning such racial balancing as violating the Equal Protection Clause.

Last year in *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 798 (2005), the First Circuit upheld a race-based public school transfer program which, on its face, provided for none of the individualized consideration of the plan approved in *Grutter*. As the appellate court noted, *Grutter* "focused on the advantages of viewpoint diversity in the classroom," *id.* at 16, whereas in the Lynn plan, "[t]he only relevant criterion . . . is a student's race." *Id.* at 18. Nevertheless, the court extended *Grutter*'s finding of a compelling governmental interest in racial diversity to cover the race-based classification and assignment of public school students. *Id.* at 16.

Similarly, in *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005) (*en banc*) (petition for writ of certiorari pending, No. 05-908) (*PICS*), the Ninth Circuit examined a program that employed a series of tiebreakers to determine which students would be admitted to oversubscribed public high schools. The ultimate tiebreaker was race. Like the Sixth Circuit in the case at bar, the *PICS* court relied on *Grutter* as providing the necessary rationale for allowing K-12 public school administrators to employ racial preferences for nonremedial purposes:

> [I]t would be a perverse reading of the Equal Protection Clause that would allow a university . . . to use race when choosing its student body but not allow a public school district . . . to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies.

Id. at 1176. Picking and choosing from *Grutter*'s hallmarks of narrow tailoring analysis, the Ninth Circuit found the school district's racial tiebreaker program to be narrowly tailored. *Id.* at 1179.

In contrast, prior to *Grutter*, three federal appellate court cases held that nonremedial use of racial preferences in public schools violated the Equal Protection Clause. Those cases are *Wessmann v. Gittens*, 160 F.3d 790 (lst Cir. 1998); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), and *Eisenberg v. Montgomery County Pub. Schools*, 197 F.3d 123 (4th Cir. 1999). Each case observed that whether racial diversity was a compelling governmental interest remained an open question.

In *Wessmann*, the First Circuit examined a race-based admissions policy at three "examination schools," where race was made a determining factor. As the *Wessmann* court stated: "The question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled." *Wessmann*, 160 F.3d at 795. The First Circuit assumed, without deciding, that racial diversity may in some cases be a compelling interest sufficient to justify the use of racial preferences in making student assignments. *Id.* at 796. The First Circuit then rejected the schools' claim:

> The Policy is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden. Nor does the School Committee's reliance on alleviating underrepresentation advance its cause. Underrepresentation is merely racial balancing in disguise—another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions.

Id. at 799 (citations omitted).

In *Tuttle*, 195 F.3d 698, the Fourth Circuit examined whether an oversubscribed public school may use a weighted lottery in admissions to promote racial and ethnic diversity in its student body. The court stated that "[u]ntil the Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a compelling governmental interest and proceed to examine whether the Policy is narrowly tailored to achieve diversity." *Id.* at 705.

In *Eisenberg*, 197 F.3d 123, the court addressed whether a school district may deny a student's request to transfer to a magnet school because of his race. The court stated: "*Tuttle* notes that whether diversity is a compelling governmental interest remains unresolved, and in this case, we also choose to leave it unresolved." *Id.* at 130.

Both the First Circuit in *Wessmann* and the Fourth Circuit were careful to point out that the type of racial diversity that may be constitutional was different from racial balancing pursued for its own sake. As explained in *Wessmann*:

> "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." A single-minded focus on ethnic diversity "hinders rather than furthers attainment of genuine diversity."

Wessmann, 160 F.3d at 798 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., opinion)).

Applying this analysis, *Wessmann*, *Eisenberg*, and *Tuttle* held that the racial preferences at issue were not narrowly tailored to serve the potentially compelling interest of student body diversity. The Fourth Circuit in *Eisenberg* found:

> In fact, we find that it is mere racial balancing in a pure form, even at its inception . . . . The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. This is, by definition, racial balancing. As we have only recently held in *Tuttle*, "such nonremedial racial balancing is unconstitutional." . . . Although the transfer policy does not necessarily apply "hard and fast quotas," its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.

197 F.3d at 131 (citation and footnotes omitted).

The conflict in the Circuits over the constitutionality of race-based public school assignments highlights an issue of pressing national importance that must be—and can only be—resolved by this Court.

II

K-12 PUBLIC SCHOOLS CANNOT MEET THE NARROW TAILORING PRINCIPLES SET OUT IN *GRATZ* AND *GRUTTER*

Too many K-12 administrators in charge of assigning students to public schools assume that the use of race is permissible after *Grutter*. J. Kevin Jenkins, Ed.D., *Grutter, Diversity, and Public K-12 Schools*, 182 Ed. Law. Rep. 353, 354 (2004) (*Grutter* provides "clear guidance from the Court: Diversity can be a compelling state interest. That's the green flag."). Not only does this view reflect an unjustified extension of this Court's holding in *Grutter*, it completely ignores the well-established narrow tailoring principles set out in *Gratz*.

Gratz invalidated an undergraduate admissions program that automatically awarded 20 points of the 100 needed to guarantee admission to every applicant from an

underrepresented racial or ethnic minority group. This mechanical application of race violated the Equal Protection Clause because it did not consider each applicant as an individual. As this Court emphasized in *Grutter*, "[T]he hallmarks of a narrowly tailored plan [is that there be] truly individualized consideration [in which race is only] used in a flexible, nonmechanical way." *Grutter*, 539 U.S. at 334.

Public school administrators are not set up to give individual consideration to students in assigning them to public schools. It would be administratively impossible to give individualized consideration to the 97,000 students in Jefferson County when assigning them to a public school. Jefferson County does not consider test scores, grades, letters of recommendation, or personal statements on how the individual student will contribute to student body diversity. Instead, the assignment is based simply on the racial classification listed for the child. Like the undergraduate admissions program in *Gratz*, race completely overrides any other factor in K-12 public schools. A child who belongs to the "wrong" race cannot overcome his or her pedigree by receiving "points" for other characteristics. Racial diversity or racial integration as applied in K-12 education, is based on stereotypes that a child's skin color determines how that child thinks and behaves, a practice denounced as racial stereotyping. Such plans are mere proportional representation by pigmentation to achieve the public school administrator's preferred racial mix of students. This is nothing more than racial balancing, which is constitutionally forbidden. As mentioned in *Goss v. Lopez*, 419 U.S. 565 (1975),

> The Court has repeatedly condemned racial balancing [and] held that a State's creation of a system of compulsory public education endows *students* (not schools) with a constitutionally-protected interest, and has pointedly reminded school authorities that "[t]he Fourteenth Amendment . . .

> protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."

Id. at 574.

As discussed above, *Wessmann*, *Eisenberg*, and *Tuttle*, together with *Gratz*, *Grutter*, and *Bakke*, lead to the conclusion that narrowly tailoring a racial preference program at the K-12 level is impossible.

> It is challenging enough to determine what elements of "diversity" a young adult, who has had time to gain some modicum of life experience, might bring to a law school class. It would be absurd to presume the ability to make such a determination for students in the public K-12 setting. Instead of conducting a thorough examination of relevant individual characteristics, schools would likely resort to race as a proxy for "the diversity that furthers a compelling state interest which encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."

Jenkins, *supra*, at 368 (citation omitted). Certainly when racial balancing becomes a permissible government objective, few of the narrowly tailoring requirements of strict scrutiny apply in any meaningful way. If racial balance is a permissible goal, there is no need for individualized consideration of applicants or consideration of other ways in which a student could contribute to diversity—race becomes the sole factor.

To remove this uncertainty and confusion, this Court should clarify for the benefit of lower courts and the public schools how *Grutter* and *Gratz* affect the Equal Protection rights of students in K-12 public schools.

III

REVIEW IS NECESSARY TO CLARIFY THAT *GRUTTER* DOES NOT COUNTENANCE RACIAL DISCRIMINATION IN K-12 PUBLIC SCHOOL ASSIGNMENTS

The Sixth Circuit's opinion in this case, deferring to the judgment of public school administrators engaged in the race-based classification and assignment of students, is fundamentally incompatible with this Court's Equal Protection doctrine. This Court has repeatedly and definitively required the strictest judicial scrutiny of governmental policies that classify and subject Americans to differential treatment according to their race. This unwavering standard of scrutiny was reaffirmed in *Grutter*:

> [A]ll racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.

Grutter, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227); *Gratz*, 539 U.S. at 270. This Court applies "strict scrutiny to ***all*** racial classifications to 'smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.'" *Grutter*, 539 U.S. at 326 (quoting *City of Richmond v. Croson*, 488 U.S. 469, 493 (1989) (emphasis added). Strict scrutiny applies to ***any*** race-based classification, regardless of the race of those burdened or benefitted by a particular classification. *See Gratz*, 539 U.S. at 270. Thus any person, of whatever race, has the right to demand that any government actor subject to the Constitution justify, under the strictest of judicial scrutiny, any racial classification subjecting that person to unequal treatment. Under a consistent application of the Equal Protection Clause, strict judicial scrutiny is required when reviewing "even benign

racial classifications designed to benefit racial minorities." Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 Loy. U. Chi. L.J. 21, 28 (2004).

As this Court has repeatedly recognized, the Equal Protection Clause prohibits the state from employing policies that look only at skin color and that fail to afford any individualized consideration to persons in recognition that they likely have relevant qualities other than skin color. *See Gratz*, 539 U.S. at 270-71. Racial balancing for its own sake has never been recognized as a compelling state interest sufficient to meet the requirements of strict scrutiny. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992). *Accord*, *Grutter*, 539 U.S. at 330. *Grutter* cannot be construed as abandoning the requirement of strict scrutiny, especially when the challenged decision involves racial policies in K-12 public schools, given this nation's history of racial stigmatization and discrimination in that context. Nothing in *Grutter* supports a more deferential posture toward school administrators under the Equal Protection Clause than that applied in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and its progeny.

In *Grutter*, this Court upheld the consideration of race among other factors in competitive admissions to an elite law school, as meeting the requirement of a compelling state interest under strict scrutiny. However, this exception to this Court's general equal protection jurisprudence was based on two factors present in the facts of *Grutter* that are never applicable in the context of K-12 public education. First was the Court's concern for the academic freedom of institutions of higher learning, grounded in the First Amendment. *Grutter*, 539 U.S. at 329. Second, the Court found that a racially diverse student body in the intellectually interactive setting of an elite law school would contribute to educational values by promoting a diversity of viewpoints. *Id.* at 329-30. Neither of these factors has any application in the context of K-12 public schooling.

On its face, of course, *Grutter* did not address whether the employment of race-driven admission policies in elementary and secondary schools similarly qualifies as a compelling state interest. *See* Ancheta, *supra*, at 36 (noting that one question left open by *Grutter* is, "[s]hould elementary and secondary school districts that employ race-conscious diversity plans be granted the same level of deference as institutions of higher education?"). *See also* Jay P. Lechner, *Learning from Experience: Why Racial Diversity Cannot Be a Legally Compelling Interest in Elementary and Secondary Education*, 32 Sw. U. L. Rev. 201, 209 (2003) ("The Supreme Court has never considered whether educational diversity could be a compelling goal of public elementary or secondary education."). To the contrary, the *Grutter* Court was careful to restrict its holding to the narrow context of higher education, a contextual qualification that the court below—like the courts of the First, Sixth, and Ninth Circuits—simply ignored. *See Grutter*, 539 U.S. at 328 ("[T]he law school asks us to recognize, *in the context of higher education*, a compelling state interest in student body diversity"); *id.* (*Grutter*, like *Bakke*, "addressed the use of race *in the context of public higher education*") (emphasis added). *See also* Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. Rev. 461, 464 (2005) (*Grutter* "asked only whether there is a 'compelling state interest in student body diversity' in 'the context of higher education' ").

Interpreting *Grutter* as authorizing widespread deference to public administrators engaged in the classification and disparate treatment of citizens on the basis of their race would constitute a sharp break with this Court's prior equal protection jurisprudence.

The inapplicability of *Grutter*'s First Amendment rationale to K-12 schools has been capably explained by Professor Ancheta, who notes that *Grutter*'s rationale "may be difficult to extend beyond academic decision making and outside of the higher education context because of the key

element of academic freedom under the First Amendment." Ancheta, *supra*, at 47. Although courts have sometimes deferred to public school administrators, this deference, unlike that of *Grutter*, "has not been rooted in academic freedoms typically ascribed to higher education, where the free exchange of ideas and viewpoints is highly valued; indeed, K-12 education is often highly standardized and regimented, particularly in the lower grade levels." *Id.* at 47.

As for viewpoint diversity, the transference of this value from the context of graduate legal studies to elementary and secondary schools borders on the nonsensical. The educational mission of K-12 public schools is different from that of universities. The purpose of American public schools is to *teach* fundamental values necessary to maintain a democratic system. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). *See, e.g.*, Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev. 959, 965 (2003) (Public school "[e]ducation is inculcation, not exposure."). K-12 public schools prepare students for citizenship, which includes teaching the principles of our Constitution. *Bethel Sch. Dist.*, 478 U.S. at 681. Such instruction necessarily includes less emphasis on the "robust exchange of ideas" in elementary and secondary school education. Joint Statement of Constitutional Law Scholars, The Civil Rights Project at Harvard University, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* 23 (2003), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf (last visited Jan. 23, 2006).

This Court's analysis in *Grutter* has resulted in confusion as to the permissible boundaries for race-conscious educational policies. Some of the questions that were left unresolved are identified by Professor Ancheta:

> If, as the *Grutter* analysis implies, courts may on occasion employ more deferential versions of strict scrutiny, what contexts determine such occasions? Was the Court's contextual scrutiny in *Grutter* specific to higher education when the Court deferred to policy making that was associated with academic freedoms rooted in the First Amendment? Or, was context grounded in a distinction between exclusionary and subordinative legislation on the one hand and inclusionary and interactive policies on the other—a distinction that the Court ostensibly rejected in *Croson* and *Adarand* when it ruled that both "invidious" and "benign" racial classifications are subject to strict scrutiny? Or is context to be addres on an ad hoc, case-by-case basis? Moreo , assuming that context properly determines the rigor of strict scrutiny, how should courts customize their analyses to fit a given context?

Ancheta, *supra*, at 23. This Court should grant the petition for certiorari in this case to clarify the narrow reach of *Grutter* in determining the special circumstances in which racial diversity qualifies as a compelling state interest.

IV

THIS COURT SHOULD REQUIRE THE NATION'S PUBLIC SCHOOLS TO SHOW THE INFEASIBILITY OF ADDRESSING THE PROBLEMS ASSOCIATED WITH RACIALLY IMBALANCED SCHOOLS *THROUGH RACE-NEUTRAL MEANS* BEFORE TURNING TO A SYSTEM OF NAKED RACIAL PREFERENCES

Deferring to public school administrators engaged in the race-based classification and assignment of students not only subverts this Court's equal protection jurisprudence; it does so

prematurely and unnecessarily. The requirement of narrow tailoring "dictates that the government use race ***only when necessary*** to achieve a compelling interest," *Comfort*, 418 F.3d at 22 (emphasis added). Public school administrators should not be allowed to invoke *Grutter* as carte blanche to avoid the necessity of determining whether their goals can be achieved through race-neutral means.

> Perhaps in lieu of spending time and money on racial balancing schemes, public school officials could better use the resources trusted to their care by focusing on the problems that currently exist in many schools serving disadvantaged students. Addressing deficiencies in neighborhood schools would allow interested students the opportunity to prepare for higher education and to compete for admission on equal footing, without the accompanying stigma and resentment associated with racial preferences.

Jenkins, *supra*, at 369-70.

There was no showing in the record below that Jefferson County was unable (or even attempted) to address the issue of racially imbalanced student populations through race-neutral means. The United States Department of Education, Office for Civil Rights has identified numerous "innovative 'race-neutral' alternatives" to promote student body diversity while avoiding the sort of blatantly discriminatory policies adopted by Jefferson County's public schools. Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004), *available at* http://www.ed.gov/about/offices/list/ocr/raceneutral.html (overview) and http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html (report) (last visited Oct. 25, 2005). Perhaps the foremost example of such a race-neutral alternative would be providing preferential assignments on the basis of socioeconomic status.

Such plans seek to reduce concentrations of poverty by providing

> all students a chance to attend middle-class schools, in which a majority of students set the tone that academic achievement is to be valued and that aspirations should be set high, students learn from one another's differences, misbehavior is kept under control and does not become contagious, and teachers are not overwhelmed by large numbers of high-need students.

Id. at 34 (citation omitted).

To the extent racially imbalanced schools are merely a side effect of poor student achievement, other race-neutral strategies can be brought to bear on the problem. These might include:

- Creating new "skills development" programs—projects designed to improve educational achievement among students who attend traditionally low-performing schools.

- Low performing schools entering into partnership with universities to strengthen their students' ability to succeed in college.

The requirement of narrow tailoring should receive more than mere lip service when a government proposes the classification and differential treatment of children on the basis of their race. This Court should grant certiorari to remind the Nation's public school administrators that adopting a system of naked racial preferences should be the last, not the first, alternative when seeking to remedy problems associated with racial imbalances in K-12 public schools.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court grant the writ of certiorari.

DATED: February, 2006.

Respectfully submitted,

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